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Supreme Court of the United States

OCTOBER TERM, 1961

No. 731

CITIZENS UTILITIES COMPANY (NEWPORT ELECTRIC DIVISION),

Petitioner,

v.

CHARLES S. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

Petitioner respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of the State of Vermont, certified by the Clerk of that Court to the Public Service Commission of that State on November 21, 1961 (Appendix A, p. 1a).* That decision, one Justice concurring on a separate ground, and the Chief Justice dissenting, reversed a unanimous Decree of the Public Service Commission (now known as the Public Service Board) of the State of Vermont granting petitioner condemnation, and fixing just compensation for the taking of certain lands of respondents.

* The Supreme Court of Vermont did not make a judgment or decree. Its decision contained a direction for certification of the result to the Public Service Commission (Appendix B, pp. 2a-18a). The certificate is set forth hereinafter at Appendix A, page 1a. All appendices are set forth in a separate bound Appendix which is being submitted with the Petition.

Opinion Below

The Opinion of the Supreme Court of the State of Vermont, here sought to be reviewed, was dated November 21, 1961, is not yet officially reported, and is set forth in Appendix B, pages 2a to 18a. Said decision is unofficially reported at 176 A. 2d 751.

The Opinion of the Public Service Commission of the State of Vermont, dated August 26, 1960, and the Additional Findings of Fact by that Commission dated October 17, 1960, are not officially reported, and are set forth at Appendix C, pages 19a to 44a.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. Sec. 1257(3). *Longest* v. *Langford*, 274 U. S. 499 (1927); *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38 (1941); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958).

Questions Presented

Petitioner and its predecessor in interest have for upwards of thirty years diverted water from, and maintained certain penstocks on, land leased from respondents. These penstocks carry water from a dam located on the Clyde River in the State of Vermont to petitioner's generating station downstream.

Under the lease, petitioner was obligated to acquire the leased land after the expiration of the term. One of the methods provided for determination of the price to be paid therefor was by institution of condemnation proceedings

> "* * * before the tribunal then having jurisdiction of such proceedings." (Appendix B, page 4a)

On March 27, 1956, within the stipulated time provided therefor, petitioner commenced a condemnation proceeding before the Vermont Public Service Commission (Appendix B, page 4a).

The questions presented are:

1. Does an order by the Federal Power Commission, without any other or further action on its part, directing a public service corporation, legally existing and operating under state authority, to apply for a license from the Federal Power Commission, in and of itself oust, on the ground of pre-emption, the Vermont Public Service Commission of jurisdiction to continue a condemnation proceeding then validly pending before it?

2. Does the Supreme Court of the State of Vermont have authority to deny condemnation on the ground that the condemnor is not properly authorized by the Federal Power Commission to operate its project—no such determination having been made by the Federal Power Commission, the Agency invested by federal statute with primary jurisdiction in such cases?

3. Where, in accordance with the provision of its lease, a tenant, a public service corporation long operating under the authority and regulation of the State of Vermont, institutes before the Public Service Commission of that State a condemnation proceeding to acquire the demised premises, have the landlords standing to oppose the condemnation on the plea that the tenant has not yet complied with an order of the Federal Power Commission, made during the pendency of the condemnation proceeding, directing the tenant to apply to the Federal Power Commission for a license to operate its project, but containing

no direction to the tenant to discontinue operation of its project, or to halt the pending condemnation proceeding, in the meantime?

Statutes Involved

16 U.S.C., Sec. 817, insofar as here material, provides as follows:

> "It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, • • • except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter."

16 U.S.C., Sec. 821 provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Section 111 of 30 Vermont Statutes Annotated, provides, in part, as follows:

> "FINDINGS, DAMS, ASSESSMENT OF DAMAGES: JURY TRIAL
>
> When the [Public Service] commission finds:
>
> (1) In the case of dams, that a certificate of public good authorizing the project as herein required, or a license from the Federal power commission has been granted; and
>
> (3) That the condemnation of such property or right is sought in order that the petitioner may render adequate service to the public in the conduct of such business, it shall adjudge the petitioner entitled to condemn such property or right, shall assess the compensation to be paid therefor, and shall determine the time and manner of such payment."

Statement

For many years up to July 29, 1930, Newport Electric Light Company (Newport), petitioner's predecessor, was the owner of certain lands situated on both sides of the Clyde River in Vermont. Petitioner and its predecessor were engaged in the business of generating and distributing electric power to consumers. The Vermont Public Service Commission found, and the Vermont Supreme

Court did not disturb this finding, that at all relevant times petitioner possessed all authorizations required under the Vermont Statutes (Appendix C, page 25a).

On July 29, 1930, a contract was made whereby Newport conveyed the lands in question to Abbie D. Prouty, respondents' predecessor, and in return took a lease of the lands for a term of twenty-five years commencing October 1, 1930. The lease required that the lessee purchase the property within six months after October 1, 1955 at (1) a price to be agreed upon between the parties and, if they were unable to agree upon a price, (2) at a price to be fixed in condemnation proceedings "before the tribunal then having jurisdiction of such proceedings", and (3) if the parties did not agree upon a price and the lessee failed to institute such condemnation proceedings, then at a price of $300,000 (Appendix B, page 4a).

As long ago as 1920, Newport had constructed a penstock—a pipe—on the land covered by the lease, through which water was taken from behind Clyde Pond dam to Newport's generating station downstream. A second penstock was constructed on the same lands approximately ten years later (Appendix C, page 21a). Therefore, since before the lease of 1930, and continuously thereafter at all times material hereto, petitioner and its predecessor had maintained and operated these penstocks upon the lands here involved and had diverted water from flowing past them.

After the expiration of the lease on October 1, 1955, the parties were unable to agree upon a price to be paid for the property. On March 27, 1956, within the six month period provided therefor in the lease, petitioner instituted a condemnation proceeding before the Public Service Commission of the State of Vermont (Appendix B, page 4a).

On May 11, 1956, more than one month after the institution of petitioner's condemnation proceeding, respondents commenced an action against Citizens in the United States District Court for the District of Vermont. Respondents sought (1) to enjoin further prosecution of the condemnation proceeding before the Vermont Public Service Commission and (2) specific performance of that provision of the lease agreement requiring Citizens to pay $300,000 for their property if no condemnation proceeding was commenced before the appropriate tribunal. The foundation for that action was respondents' assertion that the Clyde River, adjacent to which respondents' lands were located, was navigable waters of the United States; that Citizens was required to apply for and obtain a Federal Power Commission license for its projects thereon; that Citizens had not done so, and that the State Public Service Commission therefore had no jurisdiction to condemn.

The District Court action was tried in November 1956. In April of 1957 the District Court made a decision which denied respondents the injunction they sought, but nevertheless made an original finding that the Clyde River was navigable waters of the United States; that Citizens should have had a license for its projects thereon from the Federal Power Commission; that it did not have such license; that navigability of the Clyde deprived the Public Service Commission of jurisdiction to continue with the condemnation proceeding pending before it; that, as a result, Citizens had failed properly to exercise its option of condemnation; and that, on that account, respondents were entitled to a decree for specific performance requiring Citizens to take the lands and pay respondents $300,000 for them. *Prouty* v. *Citizens Utilities Co.*, 150 F. Supp. 892 (D. Vt. 1957). In short, although Citizens was disqualified from acquiring the land by con-

demnation because it had no Federal Power Commission license to operate its project, its failure to have the license was no obstacle to requiring it to acquire the same land, for the same uses and purposes, pursuant to a judgment in a suit for specific performance.

In July, 1958, the aforesaid decree of the District Court was reversed by the United States Court of Appeals for the Second Circuit. That Court held that the Public Service Commission of Vermont, in the first instance, should have been permitted to determine its jurisdiction to entertain petitioner's application for condemnation; and that it was a violation of the rules of comity for the District Court to have made that determination in a collateral proceeding which, in effect, amounted to an injunction against the Public Service Commission, contrary to the provisions of Title 28 U.S.C., Sec. 2283. The Court of Appeals specifically noted that the Public Service Commission's determination of its own jurisdiction would be subject to review in accordance with Vermont statutes and, if a Federal question were involved, by possible review in this Court of a decision of the Supreme Court of Vermont. A copy of the opinion of the Court of Appeals is set forth hereinafter in Appendix D, pages 45a to 48a. Said decision is reported at 257 F. 2d 692 (2d Cir. 1958), cert. denied, 358 U. S. 867.

Up to the time of the making of the District Court's decree of specific performance, no agency of the Federal Government had taken any notice of petitioner's project on the Clyde River. Indeed, it was not until some three months after the District Court's decision that the Federal Power Commission for the first time instituted an investigation to determine whether or not the Clyde River was navigable waters of the United States (Appendix B, page 5a).

More than one year later, i.e., on February 16, 1959, the Federal Power Commission decided for the first time

that the Clyde River was navigable waters of the United States. It directed Citizens to apply to the Federal Power Commission for a license. The Commission's order did nothing more. It did not enjoin petitioner from maintaining and operating its project; it did not direct petitioner to remove any obstruction in the stream, and neither did it direct Citizens to halt its pending condemnation proceeding before the Vermont Public Service Commission.

On April 3, 1959, pursuant to application therefor, the Federal Power Commission made an order extending petitioner's time to file its application for license "• • • until 60 days after the issuance of a final mandate by the reviewing court" (21 F.P.C. 455; Appendix E, pages 50a to 51a). This extension order is of great significance. It is clear from that order that the Commission contemplated that Citizens would continue to operate the project in the meantime. This appears from the fact that the only condition imposed by the order was that Citizens should continue to

> "• • • release a minimum flow of 35 cubic feet of water per second through the sluice gate of its unit No. 11 diversion dam in the Clyde River from the date of the issuance of this order through June 30, 1959, and thereafter *each year* from April 1 through June 30, and during such additional period or periods as fish are spawning or migrating in the river below the unit No. 11 Division Dam." (Italics ours.)

Thus despite the fact that the Commission realized that a substantial period of time would have to elapse before "the issuance of a final mandate by the reviewing court," its order contained no direction that Citizens discontinue operating its project, or that it halt the pending condemnation proceeding before the Vermont Public Service Commission, in the meantime.

In April and December, 1959, the Vermont Public Service Commission held its hearings on petitioner's condemnation petition. In August, 1960 it granted the petition for condemnation and fixed the just compensation for the taking at the sum of $95,000, i.e., $205,000 less than the amount provided for in the contract between the parties in the event there was no condemnation (Appendix C, page 41a).

As of August, 1960, the date when the Vermont Public Service Commission made its decision (and it is this decision which was reversed by the decision of the Supreme Court of Vermont, here sought to be reviewed), petitioner was still prosecuting review proceedings of the Federal Power Commission's order of February 16, 1959. Thus, on May 24, 1960 the United States Court of Appeals for the Second Circuit decided Citizens' proceedings to review the Federal Power Commission's order. That Court held that the first mile of the Clyde River (adjacent to which none of petitioner's facilities was located) was navigable waters of the United States, and that the operation of plaintiff's facilities beyond that first mile "affected" the interests of interstate or foreign commerce in the otherwise navigable portion of the stream. On that limited ground only, and specifically leaving "open" the question of navigability of the remainder of the stream, the Court of Appeals made its affirmance. A copy of the Opinion of the Second Circuit is set forth in Appendix F, pages 52a to 56a). Said decision is reported at 279 F. 2d 1 (2d Cir. 1960), cert. denied, 364 U. S. 893.

Petitioner filed with this Court a petition for certiorari to review that determination of the United States Court of Appeals for the Second Circuit. That petition was denied in November, 1960. It will be recalled that the order of the Federal Power Commission of February 16,

1959 (Appendix E, pages 45a to 48a), by its terms, postponed until 60 days thereafter, i.e. until January, 1961, Citizens' obligation to file an application for license. It goes without saying that in April and December, 1959, when the Vermont Public Service Commission heard the condemnation proceeding, and in August, 1960, when it decided that proceeding, Citizens' time to apply for the license had not expired, and it was not operating, and there was no reason to assume that it would operate, in violation of any order of the Federal Power Commission.

Petitioner and respondents filed appeals from the Public Service Commission's decision to the Vermont Supreme Court. Petitioner challenged the finding of just compensation, alleging that it was excessive and that it was determined in accordance with erroneous principles of law. Respondent's appeal challenged, once more, the jurisdiction of the Vermont Commission.

ARGUMENT

POINT I

The Federal Power Commission's order merely directs Citizens to apply for a license to operate its project. Its order extending Citizens time to do so shows, by its terms, that it recognized that the extension might postpone Citizens' time to make the application for a period measured in years. In these circumstances, the failure of the Federal Power Commission to direct Citizens, in the meantime, to discontinue operations, or to halt its condemnation proceeding pending before the Vermont Public Service Commission, shows that there was no pre-emption of jurisdiction by the Federal Power Commission and, consequently, no ouster of the jurisdiction of the Vermont Public Service Commission to continue to its conclusion the condemnation proceeding then pending before it.

Respondents contended in the Court below

> "The contention of the petitioners before the Public Service Commission, and now here, is that the Public Service Commission has no jurisdiction because of the fact that the Clyde River is navigable and is subject to the jurisdiction of the Federal Power Commission." (Appendix B, page 4a).

The Vermont Supreme Court, in holding that the Vermont Public Service Commission was ousted of its theretofore existing jurisdiction in condemnation, stated:

> "In the instant case, the facility of the private corporation for which land is sought to be obtained

by eminent domain is upon a navigable stream. The Vermont Public Service Commission has no authority to authorize a project or facility upon a navigable stream over which the Federal Power Commission has assumed jurisdiction, and therefore has no jurisdiction to issue a certificate of public good which is the grant of such authority. Bellows Falls Hydro-Electric Corp., 114 Vt. 443.

"It must therefore follow that it is without jurisdiction to exercise the power of eminent domain by virtue of a certificate of public good, for the power of eminent domain is subordinate to, and dependent upon, the license to maintain the facility for which the land sought is to be condemned" (Appendix B, pages 11a to 12a).

There was, here, no question of the issuance of a certificate of public good. The Public Service Commission found that long before the Federal Power Commission's order Citizens had complied with all state conditions required for condemnation (Appendix C, page 25a), and the Vermont Supreme Court did not disturb that finding. The Vermont Supreme Court regarded the effect of the Federal Power Commission order, directing application for license, and that alone, as the obstacle to affirmance of the Public Service Commission's order. This appears from the statement:

"Despite the fact that its project might have been previously built under State authority, the order from the Federal Power Commission to obtain a license was required to be obeyed by the petitioner (Tuscarora Indian Nation v. Power Authority of N. Y., 257 F. 2d 885; Penn. Water and Power Co. v. F. P. C., 123 F. 2d 156).

"Where a federal agency or administrative body acts in a field permitted by a valid federal statute,

its authority is paramount to that of any state board or agency, and where a federal board assumes jurisdiction of a particular case after a state board has taken jurisdiction thereof, the state board's jurisdiction is ousted. **National Labor Relations Board** *v.* Eclipse Moulded Products Co., 126 F. 2d 576; 73 C.J.S. Public Administrative Bodies and Procedure, p. 378" (Appendix B, page 13a).

This foundation of the Vermont Supreme Court's decision was inapplicable on the facts. No Federal authority had assumed to take jurisdiction over the subject matter of the State proceeding, i.e., the condemnation of respondent's land. The Federal Power Commission had directed only that Citizens apply for a license to maintain its project, nothing more.

Furthermore the court below, in holding that the Public Service Commission was ousted of condemnation jurisdiction because of the existence of the Federal licensing power, cited no case construing the Federal Power Act to support this result. Indeed, the only case cited is *National Labor Relations Board* v. *Eclipse Moulded Prods. Co.*, 126 F. 2d 576 (7th Cir. 1942), a case involving the National Labor Relations Board. Appendix B, page 12a.

That case does not support the proposition for which it was cited. Indeed, *Eclipse* specifically states that until conflict or interference between two agencies, one Federal and one State, arises "* * * there is no choice to be made as to which shall be paramount." Here, no conflict had ever arisen between the Public Service Commission of Vermont and the Federal Power Commission with reference to condemnation, and condemnation was the only issue presented to, and decided by, the Public Service Commission.

Our research does not indicate the existence of a single case construing the Federal Power Act to hold that the

mere existence of a Federal Power Commission order to apply for a license *ipso facto* preempts to the Federal Power Commission exclusive and paramount jurisdiction over condemnation proceedings. *First Iowa Hydro-Electric Corp.* v. *Federal Power Commission*, 328 U. S. 152 (1946) does not so hold. There, the holding was specifically limited on its facts to a case where conflict necessarily had to arise, i.e., in relation to licensing of the same project by both the Federal Power Commission and a state agency. Indeed, *First Iowa* specifically points out that there are areas in which the Federal Power Act specifically contemplates that jurisdiction will continue to be exercised by the states. Thus, this Court said, at pp. 167-68:

> "• • • there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue."

Condemnation is one of the subjects which the Federal Power Act confirms may be left within the jurisdiction of the states. Title 16 U.S.C. 814 specifically so provides. There is not an indication in the Act that Congress intended that condemnation was to become exclusively a matter of Federal jurisdiction.

Acquiescence in the continued jurisdiction of State agencies is found in other provisions of the Federal Power

Act, as well, i. e., Title 16, U.S.C. Sec. 812 authorizing State agencies to fix rates up to the time the Federal Power Commission sees fit to fix them, and Title 16, U.S.C. Sec. 813 giving the States the right, until the Federal Power Commission undertakes to do so, to regulate and control the amount and the character of securities to be issued by a public utility otherwise subject to the Federal Power Act. Even more closely related to our present situation, which involves the right to continue a diversion of water (Appendix C, page 41a) is Section 821, which leaves unaffected

> "the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Referring to the foregoing section, this Court in *First Iowa* 328 U. S. 152, said at page 178:

> "* * * In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage."

We find in the Federal Power Act no allocation to the Federal Power Commission of jurisdiction in matters of condemnation of land privately owned, irrespective of where it is located or to what use it is to be put, and therefore we submit that what this Court said in *First Iowa*, reproduced above, is equally applicable here: matters of condemnation of lands remain within the jurisdiction of the States.

Moreover, the opinion of the Court below specifically held that the State Public Service Commission would have had power to continue the condemnation if petitioner was

in possession of a Federal Power Commission license for its project.

The learned Supreme Court of Vermont cited the *Bellows Falls* case, 114 Vt. 443 (1946), for the proposition that the State Public Service Commission may not "authorize" a project or facility on a navigable stream over which the Federal Public Commission has assumed jurisdiction (Appendix B, pages 11a and 12a). Here, however, no question of the "authorization" of a project or facility was involved: nothing new was to be initiated; nothing was to be created; there was involved only the effectuation of the method agreed upon by the parties for the fixation of the price of a tract of land which would continue to be used for the purpose for which it had been in continuous use for upwards of 30 years.

It is respectfully submitted that the rationale underlying the doctrine of pre-emption or paramountcy is totally inapplicable in this case. Condemnation by the Vermont Public Service Commission could not interfere in the slightest with the exercise by the Federal Power Commission of the powers and remedies conferred upon it by statute. In fact, a reading of the Federal Power Act clearly shows that it is in no wise concerned with "ownership" of property: it provides only for prohibitions against maintenance and operation of projects without its permission. Condemnation does not impinge upon, or interfere with, that power.

POINT II

The learned Vermont Supreme Court erred (1) in treating the Federal Power Act as authorizing a state court to determine that a party before it in a private litigation stood in violation of an order of the Federal Power Commission, even though the Commission had not made any such finding, and, on the basis of such determination, to deny a party relief to which, undisputedly, it would otherwise be entitled; and (2) in interpreting the Federal Power Act as investing a private litigant with the right to defeat a claim made against him in a private litigation on the ground that his adversary had not complied with an order of the Federal Power Commission.

Respondents persuaded the Vermont Supreme Court that petitioner was violating the Federal Power Act by operating its project without a Federal Power Commission license, and for that reason was divested of the right to acquire their lands by condemnation as provided for in the lease between the parties.* By so doing, respondents raised, and the Vermont Supreme Court decided, a matter entrusted by statute to the initial determination of the Federal Power Commission alone. Not only has the Federal Power Commission not made any such determination, but it has not even asserted that to be the fact.

In any event, the Federal Power Commission has primary and original jurisdiction over all such matters, and it was error for the Vermont State Court even to enter

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*Quite inconsistently, the alleged violation was claimed by respondents to be no obstacle to requiring petitioner to take the same land, for the same purposes, pursuant to a judgment for specific performance at upwards of three times the value fixed in the condemnation proceeding.

tain, much less sustain, as a defense in a purely private litigation, a claim that a party had failed to comply with a Federal Power Commission Order. The doctrine has been applied specifically to the Federal Power Act, *Interstate Nat. Gas Co. v. Southern Cal. Gas Co.*, 102 F. Supp. 685 (D.C. Cal. 1952); followed by *Interstate Nat. Gas Co. v. Southern Cal. Gas Co.*, 103 F. Supp. 317 (D.C. Cal. 1952), aff'd. 209 F.2d 380 (9th Cir. 1953); *Federal Power Commission v. Arkansas Power & Light Co.*, 330 U. S. 802 (1946); *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1946).

The doctrine has been applied to orders of the Interstate Commerce Commission, the United States Shipping Board, the Federal Maritime Board, the Federal Communications Commission, the Civil Aeronautics Board and other agencies. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *United States Nav. Co., Inc. v. Cunard S.S. Co. Ltd.*, 284 U. S. 474 (1932); *Far East Conference v. United States*, 342 U. S. 570 (1952); *Stenger v. Stenger Broadcasting Corp.*, 28 F. Supp. 407 (D.C. M.D. Pa. 1939); *Adler v. Chicago & Southern Air Lines, Inc.*, 41 F. Supp. 366 (D.C. Mo. 1941).

In *United States v. Western Pac. R.R.*, 352 U. S. 59 (1956) this Court said (at page 64):

> "'Primary jurisdiction' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . ."

In *Interstate Natural Gas*, 103 F. Supp. 317 (D.C. Cal. 1952) plaintiff claimed that a defendant, in violation of Federal laws, had denied plaintiff the use of a pipeline belonging to one of the defendants. The complaint alleged

that the pipeline was a common carrier and this allegation (like the allegation of "navigability" here) was the asserted basis for recovery (209 F. 2d. at 383). The Court held that primary administrative jurisdiction over a common carrier was in the Federal Power Commission; that the plaintiff had failed to avail itself of its administrative remedies, and the action was therefore required to be dismissed for lack of jurisdiction of the subject matter (209 F. 2d. at 384-385).

Plaintiff argued in *Interstate Natural Gas* that the Federal Power Commission was deprived of its otherwise primary administrative jurisdiction because defendant had violated the provisions of the Natural Gas Act. The Court rejected the argument. It held that the administrative remedy was exclusive, at least until the Commission had passed upon the validity of the practices complained of. Finally, the Court in *Interstate Natural Gas* held that the thrust of the principle of primary administrative jurisdiction could not be avoided by a plaintiff's claim of damage resulting from the alleged private actions of the defendants. The unavoidable predicate for a finding of such damage was adjudication by the Court on matters which were within the jurisdiction of the Commission. That necessary preliminary determination ousted the Court of jurisdiction.

The applicability of this principle to the case at bar is plain. The Federal Power Commission is entrusted by the Federal Power Act with the responsibility for determining "navigability" as defined by the Act (Title 16 U. S. C. Sections 796(8), 797(g), 817). It is also charged with enforcement of licensing provisions of the Act. Instances where the Federal Power Commission, on its own initiative, has commenced proceedings to compel an application by a utility for Federal Power Commission license are

not unusual. *Montana Power Co. v. Federal Power Commission*, 185 F. 2d 491 (D.C. Cir. 1950); *Wisconsin Public Serv. Corp. v. Federal Power Commission*, 147 F.2d 743 (7th Cir.) 1945), cert. denied 325 U. S. 880; *Pennsylvania Water & Power Co. v. Federal Power Commission*, 124 F.2d 455 (D.C. Cir. 1941), cert. denied, 315 U.S. 806.

Related to the violation of the rule of primary jurisdiction, is the fact that the decision below permits respondents, as private parties in a private litigation, to raise a question of public importance in reference to which their interest is no different from that of any other member of the public at large.

Where a Federal statute purports to deal comprehensively with a subject of Federal regulation and provides by whom the provisions of the statute shall be enforced or violations redressed, it has uniformly been held that persons outside of classes specifically enumerated may not procure determinations within the ambit of the statute.

The Federal Power Act is such a statute.

Title 16 U.S.C., Section 797(g) authorizes the Commission to initiate investigations concerning compliance with the Act. Section 820 of the same Title authorize the Attorney General, under certain conditions, to institute equity proceedings in the District Court, for the purpose of remedying by injunction, *mandamus* or other process any act of commission or omission in violation of the provisions of the Act or of any lawful regulation or order promulgated thereunder. Section 825 of the Title provides for complaints to the Commission by other Commissions, municipalities, state or *private persons*. Section 825f provides for investigations by the Commission. Section 825m authorizes the Commission to bring action in a District Court to enjoin practices which will constitute violations of the Act. Finally, under Title 33 U.S.C. Sections

406 and 413 there are provisions authorizing the institution of certain civil and criminal suits in connection with river and harbor improvements, waterways and the like.

None of the sections referred to above, or any other in the Act, confers a right upon respondents to raise, litigate and have determined by the Vermont Supreme Court the question of whether petitioner was or was not maintaining its project on the Clyde River in accordance with the Federal Power Act, and, on the answer to that question, predicate a judgment relieving respondents of their contractual obligations. Yet, this is the underlying ground for the Court's reversal of the decree of the Public Service Commission.

In doing that, we submit, the Vermont Supreme Court exceed the power left to it by the Federal Power Act.

The public interest in the enforcement of the requirements of these statutes precludes private litigation of such public rights. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511 (1955); *Johnson* v. *Chesapeake & Ohio Ry.*, 188 F.2d 458 (4th Cir. 1951), cert. denied, 342 U. S. 843; *Mowtchock* v. *Givens*, 180 F.2d 221 (C.A. 7th, 1950); *Connor* v. *South Carolina Public Service Authority*, 91 F. Supp. 262 (D.C. S.C., 1950).

In *Johnson*, the Court clearly expressed the rationale underlying its decision. It stated, at page 458:

> "'But to allow any private interest to thresh out the complicated questions that arise out of §1 (18-22) — as, for instance, whether a proposed construction is an 'extension' or a 'spur', • • • is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues. It also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give

> the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable, as to be avoided, unless Congress has explicitly cast the duty upon the courts. Against any such implication, in the absence of rather plain language, the whole course of federal railroad legislation and the relation of the Interstate Commerce Commission to it admonishes. The interests of merely private concerns are amply protected even though they must be channelled through the Attorney General or the Interstate Commerce Commission or a state commission."

The *Conaon* case specifically applied the same principle to the provisions of the Federal Power Act.

We respectfully submit that the importance of the questions raised by this Petition far transcends the issue whether the Vermont Supreme Court was correct or incorrect in its decision here sought to be reviewed. If the Vermont Court was right in construing the Federal Power Act to make the order of the Federal Power Commission an automatic ouster of the jurisdiction of the Vermont Public Service Commission to continue the condemnation proceeding then pending before it, then anyone whose lands were duly taken by a Public Service Company by condemnation under State authorization would have the right to challenge the validity of the taking at any time in the future that the Federal Power Authority might decide to exercise licensing authority over the Public Service Company. This consequence is implicit in the holding of the Vermont Court, for it retroactively vitiates the propriety and effectiveness of orders duly and properly made by state agencies at times when no assertion of Federal jurisdiction had been made. Furthermore, it permits private parties to intermeddle in matters and affairs entrusted by federal statute solely to the direction

of the Federal Power Commission, and to procure results which are not only not contemplated or sought by the federal agency, but which, indeed, are entirely contrary to any action taken by the agency.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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